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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 810

FRANK J. BOEHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1239–1277) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 1277–1278) was entered November 6, 1941, and a petition for rehearing was denied November 26, 1941 (R. 1313). The petition for writ of certiorari was filed December 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U. S. C., Sec. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in refusing petitioner's demand for the transcripts of prior testimony given by the Government's witnesses before the Securities and Exchange Commission which was admittedly contrary to their testimony at the trial.

2. Whether it was error to refuse petitioner's requested instruction that the evidence of his good reputation "standing alone may create a reasonable doubt, although without it the other evidence may be convincing."

3. Whether the trial court correctly charged the jury with respect to the necessary quantum of evidence in perjury cases.

4. Whether the trial judge, in his supplemental charge given to the jury after it had deliberated for twenty-six hours, coerced the jurors to agree upon a verdict.

STATEMENT

On March 13, 1940, petitioner was indicted for perjury in violation of Section 125 of the Criminal Code (R. 8–23). The indictment was in five counts, but petitioner was convicted only upon counts 4 and 5 (R. 15–22, 1114–1115), which charged him with falsely testifying before an examiner of the Securities and Exchange Commission in the course of an investigation conducted by the Commission into activities and affairs of the Union Electric Company, hereinafter called the company. One of the purposes of the investigation was to determine whether there had been a violation of Section 12 (h) of the Public Utility Holding Company Act of 1935, which prohibits "a registered holding company or any subsidiary" from making political contributions.

More particularly, counts 4 and 5 of the indictment alleged that petitioner, who was executive vice president and director of the company, swore falsely when he testified (1) that "he did not pad his own expense accounts"; (2) that he had taken "all of the trips that were listed on his expense

vouchers"; (3) that the company never maintained a cash fund for political purposes and "any cash in his office or on his person, or in his safe was his personal fund"; (4) that neither the company nor its officers obtained any money "by means of kick-backs or rebates from attorneys" retained by it (R. 19); (5) that the company obtained no money by kick-backs or rebates from supply companies or in any other "off the record" manner; (6) that he "never made any political contributions or loans or contributions to any candidate for public office for and on behalf of" the company; and (7) that "he had never made a political contribution in an amount in excess of $100" (R. 21).

Petitioner was sentenced to five years' imprisonment on each count, the sentences to run concurrently, and fined $4,000 (R. 1118–1119). The judgment of conviction was affirmed by the Circuit Court of Appeals for the Eighth Circuit (R. 1239–1277).

Petitioner does not question the sufficiency of the evidence which, the Circuit Court of Appeals said, "must convince beyond reasonable doubt, that the [petitioner] committed the perjuries charged against him as found by the jury * * *" (R. 1261). The evidence is summarized merely for the purpose of showing the background against which petitioner's contentions must be measured.

Rebates or kick-backs by attorneys.—Petitioner had testified before the examiner that no money was received by the company or its officers through rebates or kick-backs from attorneys retained by it (R. 359–363). By uncontradicted evidence at the trial, however, it was shown that at petitioner's instance at least four attorneys retained by the company systematically rebated or kicked back over a period of about nine years one-half or more of their annual retainers in a total amount of at least $360,000.

Thus, B. P. Alschuler of Aurora, Illinois, who was retained at $38,000 per annum, testified that he returned to petitioner or, in rare instances, one of his subordinates, in places like interurban stations (R. 380), approximately $19,000 per annum for six years (R. 379–381, Ex. U. S. 69–88B; R. 401–446). E. Bentley Hamilton of Peoria, Illinois, who received $40,000 per annum (Ex. U. S. 93, 93–00; R. 493–500) rebated to petitioner, in cash, about $20,000 a year from about 1930 up to the early part of 1939 (R. 475–479). Similarly, Rex Fowler, Des Moines, Iowa, received an average retainer of $12,000 per annum from 1932 through 1938 (Ex. U. S. 90–92D; R. 447–451), from which he rebated about $6,000 annually (R. 396–397, 451). Fowler usually gave cash to Laun or Williamson, petitioner's subordinates (R. 397), who, in turn, delivered it to petitioner (R. 459–462, 975–976). A somewhat different practice was

followed with Guy C. McMillan of St. Louis, Missouri (R. 501). One Jimmie Miller, a St. Louis political ward boss, approached Laun around 1933 and requested a "salary" of $100 a month for exerting his political influence on behalf of the company (R. 972). Miller received this "salary" in cash provided by McMillan, who was employed by the company as a collection attorney and who, it was arranged, should receive a special monthly "retainer" of $100 (R. 972–974). At Laun's direction McMillan returned this retainer in cash to Laun, who in turn passed it on in cash to Miller (R. 502–505, 972–974). About 1935 the amount was increased to $200 a month and this practice continued through 1937 (R. 503).

Rebates or kick-backs by concerns supplying materials or services to the company.—At the Securities and Exchange Commission hearing, petitioner denied that the company obtained any money through rebates or kick-backs from persons or concerns supplying it with materials or services, or in any other off the record manner (R. 363). It was shown at the trial, however, that at least $160,000 in cash, all of which passed through petitioner's hands, was realized in this way.

In about 1930 it was necessary for the company to purchase a large supply of insulators (R. 534). Several companies submitted substantially similar bids (R. 534). One of these was

submitted by Lapp Insulator Company through L. H. Keller. Together with petitioner, George K. Miltenberger, petitioner's subordinate and a friend of Keller, consummated an arrangement with Keller whereby the Lapp Company received the contract and agreed to and did rebate 10% of the contract price to petitioner (R. 534–536, 538–539). A similar plan was later devised whereby Keller supplied the company with poles, rebating to petitioner or Miltenberger 10% of the purchase price (R. 539–551, 568).[1] These rebates continued through 1937 (R. 547).

Again, at petitioner's instigation, an arrangement was made with the company's insurance brokers whereby, commencing in 1931, the brokers would pay over to petitioner large amounts of cash under the guise of credits due on fictitious survey charges, favorable risk credits, savings effected by purchasing long-term contracts and savings occasioned by securing special discounts on fleet contracts (R. 623–624, 648, 649, 576, 580, 581–586, 608–613; Ex. U. S. 124, 124A, 124B; R. 622; Ex. U. S. 128B).

Padding of petitioner's expense accounts.—Petitioner had testified before the examiner that none of the expense accounts which he submitted to the company were at any time padded and that he

[1] A large number of bank statements, drafts, and checks used by Keller, evidencing these rebates, were introduced in evidence (Ex. U. S. 67–68A, 101–102E, 103, 107; R. 533–560).

took all the trips listed thereon (R. 355–357). It was shown at the trial, however, that it was petitioner's practice to submit monthly expense accounts covering alleged trips to New York and Washington, including entertainment and miscellaneous expenses incurred on behalf of the company (Ex. U. S. 139, R. 863; Ex. U. S. 139A, R. 837; Ex. U. S. 139B, R. 761)[2] when in fact petitioner was in St. Louis and other places in Missouri.[3]

Slush fund and political contributions.—In his testimony before the Commission, petitioner denied that the company ever maintained a fund for political purposes and asserted that all cash in his office and safe and on his person was his own (R. 357–358). The manner in which petitioner received funds as rebates on attorneys' fees, kick-backs on equipment and insurance contracts and by padding his own expense accounts has already been shown. Substantial sums were

[2] In about 1935 the company's system of accounts was changed and the expense accounts were no longer submitted in detail (R. 937). This, of course, made it virtually impossible to establish, except by oral admission, the fictitious character of such accounts after that date.

[3] See Ex. U. S. 139A, R. 837; U. S. Ex. 167–168B, R. 839–845, 995; Ex. U. S. 139, R. 863; Ex. U. S. 169–169B, 156–156D, 170–170F, 159–159E, 171–171B, 171–172–172F, R. 865, 871, 877, 883, 889, 894; Ex. U. S. 139B, R. 761; Ex. U. S. 161–161J, 162–163J, 160–160B, 152, 157–157B, 158–158C, 157C, 164–164F, 165–165D, R. 767, 768, 771, 776–784, 787, 792–795, 796–801.

also realized by similar padding of the expense accounts of other officers of the company.[4]

It is apparent from the undisputed evidence, therefore, that petitioner collected a cash fund of at least $580,000.[5]

Despite petitioner's denial before the examiner that any political contributions or loans were ever made to candidates for public office or public officials on behalf of the company, and that he ever made any political contributions exceeding $100, the evidence shows that petitioner disbursed at least $62,365 to candidates and office holders. These contributions, which were always made in cash by petitioner or his subordinates and not dis-

[4] The following officers and employees of the company testified that they rebated to petitioner, from funds paid them pursuant to expense vouchers, the approximate amounts set opposite their names:

George K. Miltenberger	$7,000	(R. 803–806)
Shurly R. Irish	6,725	(R. 823–826)
William Avery	2,000	(R. 809–810)
E. J. Emberson	4,000	(R. 815–818)
Herman Spoehrer and Eugene Kropp	8,200	(R. 675, 688, 692–698)
Harry Williamson	21,000	(R. 899–907)
Vernon Flynn	4,828	(R. 909–910)
George Welsh & George May	1,140	(R. 917–932)
	54,893	

[5] This was derived from the following sources: E. Bentley Hamilton contributed about $190,000 (R. 500); B. P. Alschuler contributed about $123,000 (R. 450); Rex Fowler contributed about $44,250 (R. 450); Guy C. McMillan contributed about $72,000 (R. 511); L. H. Keller contributed about $72,000 (R. 574–576); Herman Spoehrer, from the insurance account, contributed over $90,000 (R. 648–649); persons other than petitioner who padded expense accounts contributed over $54,000.

closed on company records (R. 971–997), went to a wide variety of persons in Missouri and Illinois, including candidates for Congress (R. 725, 944, 945, 989), Governor (R. 939–941, 958, 962, 986–987, 988, 454–457, 918–919, 955–956, 991, 1002), Lieutenant Governor (R. 992), State Supreme Court Justice (R. 942, 988), State Auditor (R. 748–750, 987), State Senate (R. 935–936, 987, 992–994), State House of Representatives (R. 750–753, 946, 947, 952–953, 962–963, 989–994), and to County Judges (R. 943–944, 989), Prosecuting Attorneys (R. 1000–1001), Sheriffs (R. 1001), Engineers (R. 993), Collectors (R. 994), Mayors (R. 964, 965, 1003), Commissioners (R. 919, 933), and Aldermen (R. 927), as well as political bosses (R. 933–935, 920–922, 972–974, 996, 997).

Petitioner's defense.—Petitioner did not testify on his own behalf, and relied chiefly upon the testimony of a number of witnesses who testified as to his prior good reputation (R. 1040, 1054, 1055, 1057–1061, 1066).

It was shown, however, that petitioner had admitted to three witnesses for the Government (R. 641, 1004, 1005) that "being in the position of not being able to make proper deductions from his personal income tax returns for illicit expenditures" he was "in a terrific spot" and hence in testifying before the Commission "as the lesser of two evils, he choose the perjury route" (R. 1007).

ARGUMENT

I

Petitioner complains (Pet. 26–34) that he was unable adequately to cross-examine Government witnesses because he was not permitted to inspect transcripts of testimony previously given by them before the Securities and Exchange Commission. However, as the court below held (R. 1262–1263), the record discloses that no limitation was placed upon petitioner's cross-examination of these witnesses,[6] all of whom admitted that their testimony was inconsistent with that which they had theretofore given at the Commission's investigation (R. 464–473, 568–569, 758, 808–809, 814, 821–822, 833, 907–908, 965–968). In most instances they were employees of the company and subordinates of petitioner, or attorneys who had been employed at his direction (R. 377–386, 398, 399, 488–491). Almost without exception, they stated that they had perjured themselves at the instance and request of petitioner (R. 658–659, 817, 965–968), and made a practice of advising petitioner of their perjury (R. 382–392, 568–569, 808–809, 965–968). Consequently, petitioner's claim that he was prejudiced in his cross-examination of these witnesses because he was ignorant of "the material details of the prior conflicting testimony" (Pet. 30–31) is palpably frivolous.

[6] In some instances (e. g. R. 738–739) petitioner's various counsel cross-examined witnesses in relays.

Moreover, even if the petitioner had not known of the witnesses' prior perjurious testimony, it is settled that once a witness admits prior contradictory statements, it is unnecessary to burden the record with additional proof thereof. *Crowley* v. *Page*, 7 Car. & Payne 789; *State* v. *Cooper*, 83 Mo. 698; *Swift & Co.* v. *Madden*, 165 Ill. 41; *Lightfood* v. *People*, 16 Mich. 507; Wharton, *Criminal Evidence* (10th ed. 1912) sec. 483; Jones, *Evidence* (4th ed. 1938) sec. 849; draft of *Uniform Evidence Act*, sec. 21.[7]

Furthermore, as stated by the Circuit Court of Appeals, petitioner was "clearly not entitled" (R. 1265) to demand a transcript of all the testimony of all the witnesses. The transcripts of the evidence taken before the examiners embodied results of the investigative activities of the Commission, and to permit petitioner to examine the entire transcripts would not only have revealed the Government's case against him before it was presented to the jury, but would have advised other possible defendants that they were under suspi-

[7] *Heard* v. *United States*, 255 Fed. 829 (C. C. A. 8), cited by petitioner (Pet. 32–33) is not in point, for, as was said by the court below (R. 1265), which decided that case, petitioner in the present case "was accorded the right to and did cross-examine at length and without any unreasonable limitation about what the impeached witnesses did or did not tell the investigators prior to the trial, both in colloquy and under oath."

cion.[8] It might also have exposed innocent persons who would be cleared of complicity through further investigation. Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 234; *In re Securities and Exchange Commission*, 84 F. (2d) 316 (C. C. A. 2), reversed as moot, 299 U. S. 504; *Woolley* v. *United States*, 97 F. (2d) 258 (C. C. A. 9), certiorari denied 305 U. S. 614.

Finally, in view of the overwhelming evidence of petitioner's guilt, the denial of his request to examine the transcripts, even if erroneous, would not warrant a reversal of his conviction. *United States* v. *Trenton Potteries*, 273 U. S. 392, 404; *United States* v. *Socony Vacuum Oil Co., supra*, at p. 231. As the court below pointed out (R. 1261), "consideration of the testimony, oral or documentary, must convince beyond a reasonable doubt that [petitioner] committed the perjuries charged against him as found by the jury, and [his briefs] * * * contain no intimation to the contrary."

II

The holding of the Circuit Court of Appeals (R. 1274–1275) that it was not error to refuse

[8] Two other prosecutions arising out of the same proceedings have been instituted. *United States* v. *Illinois-Iowa Power Co. et al.* (S. D. Ill.); *United States* v. *Union Electric Co. et al.*, (E. D. Mo.). In the *Illinois-Iowa* case, the corporate defendant pleaded *nolo contendere* and was fined $5,000, whereupon the Government entered pleas of *nolle prosequi* as to the individual defendants. The *Union Electric Co.* case is now on trial.

petitioner's requested instruction that the evidence of his good reputation (R. 1040, 1054, 1055, 1057–1061, 1066) was alone sufficient to create a reasonable doubt, is plainly correct and does not present any conflict of decisions warranting certiorari.

The trial court charged the jury that if the character testimony engendered a reasonable doubt, when considered with the other facts and circumstances of the case, petitioner was entitled to an acquittal; but, if all the evidence, including the character evidence, convinced the jury of his guilt beyond a reasonable doubt, his previous good reputation in no way served to "mitigate or palliate" his guilt (R. 1103). This instruction correctly stated the law and was all that petitioner was entitled to ask.

Petitioner's argument that *Edgington* v. *United States,* 164 U. S. 361; *Egan* v. *United States,* 287 Fed. 958 (App. D. C.) and *Snitkin* v. *United States,* 265 Fed. 489, 491–492 (C. C. A. 7)[9] required that

[9] Contrary to petitioner's assertion (Pet. 37–38), it seems clear that the opinion below is not in conflict with the prevailing rule in the Seventh Circuit. See *Allen* v. *United States,* 4 F. (2d) 688, 694–695 (C. C. A. 7); *Haffa* v. *United States,* 36 F. (2d) 1, 5 (C. C. A. 7) certiorari denied, 281 U. S. 727.

Miller v. *United States,* 120 F. (2d) 968 (C. C. A. 10) cited by petitioner (Pet. 38) as being in conflict with the opinion below, is not in point. The court there was dealing with an instruction which "limited the consideration of the character testimony to a determination whether the prose-

his requested instruction be given, has been twice rejected in decisions which this Court refused to review. *Kreiner* v. *United States,* 11 F. (2d) 722, 726 (C. C. A. 2), certiorari denied 271 U. S. 688; *Haffa* v. *United States,* 36 F. (2d) 1, 5 (C. C. A. 7), certiorari denied 281 U. S. 727. As we said in our Brief in Opposition in the *Haffa case, supra,* the statement in the *Edgington* decision (p. 366) that character evidence may alone create a reasonable doubt was not the announcement of "a rule of law" but a "statement of what may result in some cases from the application of the correct rule"[10] and the *Egan* and *Snitkin* cases "misinterpreted and misapplied the holding of the

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cuting witnesses committed perjury or were mistaken." 120 F. (2d) at 972. The Tenth Circuit is definitely committed to the validity of an instruction of the type given in this case. *Arnold* v. *United States*, 94 F. (2d) 499, 502–503 (C. C. A. 10); *Hancey* v. *United States*, 108 F. (2d) 835, 837 (C. C. A. 10).

[10] This interpretation of the *Edgington case* is uniformly accepted in all jurisdictions where the question has arisen except in the District of Columbia. *LeMore* v. *United States*, 253 Fed. 887, 894 (C. C. A. 5), certiorari denied, 248 U. S. 586; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C. C. A. 3), certiorari denied, 260 U. S. 735; *Grace* v. *United States*, 4 F. (2d) 658, 662 (C. C. A. 5); *Allen* v. *United States*, 4 F. (2d) 688, 695 (C. C. A. 7); *Searway* v. *United States*, 184 Fed. 716, 717 (C. C. A. 8); *Winter* v. *United States*, 13 F. (2d) 53, 59 (C. C. A. 8); *Linde* v. *United States*, 13 F. (2d) 59, 61–62 (C. C. A. 8); *Mansfield* v. *United States*, 76 F. (2d) 224, 230 (C. C. A. 8), certiorari denied, 296 U. S. 601.

Edgington case." (No. 587, October Term, 1929, pp. 9, 11–12).

III

Petitioner contends (Pet. 17, 40–42) that the trial court's refusal to charge that circumstantial or corrobrative evidence "of itself is not sufficient to support a charge of perjury" (R. 1093) negatived the requirement that the uncorroborated testimony of one witness is insufficient (R. 1099, 1104). But petitioner does not point to a single instance in which the proof of the perjurious statements alleged in the indictment rests on circumstantial or uncorroborated testimony.

As we have shown, the falsity of each statement was unequivocally proved by the direct testimony of two or more witnesses with the exception of petitioner's denial that he padded his own expense accounts. The falsity of this statement, however, was established by various letters, memoranda, vouchers, and other documents written and signed by petitioner in St. Louis on occasions when, according to his expense statements, he was elsewhere.[11] As early as *United States* v. *Wood*, 14 Pet. 430, this Court recognized that documents of

[11] Exs. U. S. 169–169B, 156–156D, 170–170F, 159–159E, 171–171B, 172–172F; R. 865, 871, 877, 883, 889, 894; Exs. U. S. 161–161J, 162, 163–163J, 160–160B, 152, 157–157B, 158–158C, 157C, 164–164F, 165–165D; R. 767, 771, 776–784, 787, 792–795, 796–801.

this character may constitute sufficient evidence of the perjurious character of the testimony attacked.[12] Moreover, apart from the documentary proof, the witness Laun testified that he saw petitioner in Missouri at times when, according to the expense account submitted by him, he was in New York (R. 995). This is corroborated by the airplane log of the company (Exs. U. S. 167–168B, R. 839–845).

In any event, there were four specifications of perjury in the fourth count, only two of which pertained to the padding of petitioner's own expense accounts (R. 15–20)[13] and it is well established that "all the several particulars, in which the prisoner swore falsely, may be embraced in one count, and proof of the falsity of any one will sustain the count." Wharton, *Criminal Law*, 12th ed., Vol. 2, sec. 1567; *United States* v. *Masciuch*, 111 F. (2d) 602, 603 (C. C. A. 2), certiorari denied 311 U. S. 650.

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[12] See also *Hammer* v. *United States*, 271 U. S. 620; *Warszower* v. *United States*, 312 U. S. 342. Cf. *Gordon* v. *United States*, 5 F. (2d) 943–945 (C. C. A. 8); *Behrle* v. *United States*, 100 F. (2d) 714, 715 (App. D. C.); *Schonfeld* v. *United States*, 277 Fed. 934, 939 (C. C. A. 2), certiorari denied 258 U. S. 623; *Phair* v. *United States*, 60 F. (2d) 953–954 (C. C. A. 3); *State* v. *Storey*, 148 Minn. 398, 182 N. W. 613.

[13] The fifth count contained no allegation with reference to the padding of petitioner's expense accounts (R. 20–22).

IV

Petitioner urges (Pet. 42–47) that the supplemental instructions given the jury (R. 1109–1111) after they had deliberated some twenty-six hours (R. 1109), were coercive and deprived him of his right to a fair trial.[11]

Despite petitioner's assertion to the contrary (Pet. 46), the supplemental charge is, in terms, without material variation from that given in *United States* v. *Allis*, 73 Fed. 165, 182 (C. C. E. D. Kans.), affirmed, 155 U. S. 117, and similar to that approved in *Allen* v. *United States*, 164 U. S. 492, 501. See also *United States* v. *Commerford*, 64 F. (2d) 28, 31 (C. C. A. 2), certiorari denied 289 U. S. 759; *Commonwealth* v. *Tuey*, 8 Cush. 1. The charge must be read in its entirety and merely because the court pointed out that it was highly desirable for the jury to return a verdict in order to avoid another long and expensive trial and that they should consider the case "with candor and with proper regard and deference to the opinions of each other" (R. 1111), it does not follow that the jurors were coerced into returning a verdict of guilty. The court repeatedly em-

[11] The entire basis of petitioner's objection to the supplemental charge is conjectural. All that is known is that the jury had been out for a whole day and had not returned a verdict.

phasized that it did not wish any juror to forsake his own conscientious convictions and that the verdict of each juror was to be his own independent opinion and "not a mere acquiescence in the conclusion of his fellows" (R. 1110). Hence it is clear that the court carefully observed the caution about turning "the balance against the accused" voiced in *Burton* v. *United States,* 196 U. S. 283, 306–307, upon which petitioner principally relies (Pet. 45–46). As the court below pointed out the trial judge "said nothing to tilt the scale in the jury's hands" (R. 1276).

Moreover, as the Circuit Court of Appeals stated (R. 1275), "The issues involved in the case were simple, and the evidence of [petitioner's] guilt was so overwhelming that there was little room for reasonable doubt." Should the jury have been unable to agree, it is apparent, from examination of the record, that a miscarriage of justice would have resulted. As this Court has recognized in such a situation the trial judge is warranted in using stronger language than perhaps might be justified where the evidence is more evenly balanced. *Horning* v. *District of Columbia,* 254 U. S. 135, 138–139.

CONCLUSION

The case was correctly decided below, there is no question of general importance, and there is

involved no conflict of decisions warranting certiorari. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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